(2)

No. 91-862

In the
Supreme Court of the United States
October Term, 1991

STATE OF MINNESOTA,

Petitioner,

v.

KATHLEEN RITA McKOWN and
WILLIAM LISLE McKOWN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW?

II. WHETHER THE MINNESOTA SUPREME COURT DECISION CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT?

III. WHETHER THE MINNESOTA SUPREME COURT HAS DECIDED A FREE EXERCISE QUESTION?

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OPINIONS BELOW

The Minnesota Supreme Court Opinion is reported at *State v. McKown,* 475 N.W.2d 63 (Minn. 1991).

The Minnesota Court of Appeals Opinion is reported at *State v. McKown*, 461 N.W.2d 720 (Minn.App. 1990).

The Hennepin County District Court Opinion was not reported and is attached, as are the others, to the Petition.

Petitioner's Appendix is cited as (A __); Respondents' Appendix is cited as (Ap __).

JURISDICTION

Under the provisions of 28 USC §1257(a), this Court does not have jurisdiction over this case because no statute is drawn in question on the ground of its being repugnant to the Constitution, i.e., neither statute was found unconstitutional, but the prosecution was held to violate federal and state due process as a result of the interrelation of the two statutes.

CONSTITUTIONAL PROVISIONS

1. The Due Process Clause of the Minnesota Constitutional requires:

> ". . . [N]o person shall be held to answer for a criminal offense without due process of law."

Minn. Const. Art. I, §7.

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

We agree with the facts as set forth by the Minnesota Supreme Court (A 1), the Minnesota Court of Appeals (A 19) and the Hennepin County District Court (A 33) and add brief highlights from each Opinion to correct misstatements or misimplications from the Petition.

Respondents William and Kathleen McKown, and Mario Tosto (a Christian Science practitioner) were indicted by a Hennepin County grand jury for second degree manslaughter and for aiding and abetting each other and causing the death of Ian Lundman by culpable negligence.

Hearings were held March 26 through 27 in Hennepin County District Court on Respondents' Motions to Dismiss the Indictments. Defendant Tosto's motion was granted without objection on March 27, 1990. The District Courtf granted the Motion to Dismiss on two separate grounds.

First, the District Court found there was no probable cause to believe Respondents were grossly negligent; in doing so, it held that Minnesota's child neglect statute, Minn. Stat. §609.378, provides the applicable standard of care for parents such as Respondents who in good faith select and depend upon spiritual treatment as health care for their children. The trial court, after looking at the legislative history and statues in question, found that "the overall legislative scheme was designed to have the state intervene in the case of an emergency rather than punish the parents either with child neglect or 'any criminal sanction'." (A 38).

Alternatively, it found that the Indictments violated both state and federal due process clauses for failing to give notice that good faith conduct under Minn. Stat. §609.378 could be criminal conduct under Minn. Stat. §609.205. The confusion between the two statutes and the County Attorney's conduct before the grand jury in improperly instructing the grand jury as to the proper standard of care, substantially prejudiced the rights of

the defendants as well as violating their due process rights. (A 40).

The Court of Appeals affirmed the dismissal of the manslaughter Indictments against Respondents on state and federal due process grounds. In doing so, it observed changes in the related maltreatment of minors reporting statutes. Based upon the amendments to the reporting statute, the Court concluded:

> We believe the new reporting requirement will help prevent future tragedies because it is the practice of good faith adherents to Christian Science to enlist the support of the Christian Science nurses and practioners in dealing with serious illness, and to cooperate fully with public health authorities. At the time of Ian's death, no such reporting requirement existed, and there was, therefore, no opportunity for child welfare authorities to intervene." (A 23).

The Court of Appeals also noticed the unusual factual circumstances of actual knowledge and reliance by Respondents on the confusing state statutory scheme as follows:

> "Evidence before the trial court suggests that, due to the sensitive nature of this issues, many Christian Scientists, including the McKowns, were specifically aware of the statutory provisions relating to the use of spiritual means and prayer. They may have indeed 'mapped out' their behavior based upon the statute. While the cases in this are are more likely to involve reliance by the defendant on administrative pronouncements, there is nothing inherent in the concept which would make it inapplicable to an argument of reliance on a specific statutory enactment. The State in this instance has attempted to take away with the one hand - by way of criminal prosecution - that which it apparently granted with the other hand, and upon which defendants relied. This it cannot do, and meet constitutional requirements." (A 29-30).

The Minnesota Supreme Court affirmed the Court of Appeals noting the uniqueness of this due process violation. (A 9-10).

The Minnesota Supreme Court found that the statutory interrelation did not suffice to give individuals unambiguous notice of the boundaries within which they must operate to avoid prosecution. Similar to the Court of Appeals, it recognized the unique unlimited language of the accomodation to spiritual treatment in Minnesota in concluding that the language does not satisfy the fair notice requirement inherent to the concept of due process. (A 11-12). The Minnesota Supreme Court further recognized the factually unique circumstances of Respondents' being misled by the government where they are officially informed that conduct is permitted and then prosecuted for engaging-in that same conduct. (A 12).

None of the three decisions, expressly or by implication, decides a free exercise of religion issue. Contrary to the assertion of Petitioner, the Minnesota Supreme Court expressly stated "we need not address this issue." (A 13, fn. 9).

SUMMARY OF THE ARGUMENT

The Petition must be denied because it fails to state a reason for the granting of a writ cognizable by Supreme Court Rule 10 or any other special and important reason.

First, the Minnesota Supreme Court decision, as well as the two lower court decisions, is premised on a singularly unique Minnesota statute worded in broad language. No other reported opinion has a similar statute. Since Ian's death, the statute in question has been amended. Minn. Stat §609.378 also has been and is the subject of several legislative proposals for amendment or repeal. Additionally, the related child neglect intervention and reporting statutes have been considered and revamped since Ian's death. Therefore, the case is binding only in Minnesota and that significance is largely historical.

Second, there is only one decision of another state court of last resort arguably within Supreme Court Rule 10(b). Petitioner cites an Indiana, a Florida and a California case as in conflict. The Indiana case decided no due process issue; the Florida case in not a court of last resort; and the California case is based on a vastly different statute and totally dissimilar facts.

Third, Petitioner advances arguments with respect to free exercise issues which were not decided nor relevant to the decision below.

ARGUMENT

I. THE MINNESOTA SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW.

The Minnesota Supreme Court did not decide an important federal question because:

1. The question is unique to the Minnesota statutory scheme.
2. That statutory scheme has since been changed.
3. The decision rests on the peculiar facts before the Minnesota Court.

The Minnesota Supreme Court decided that the prosecution violated due process because of the interrelation of two state statutes; to-wit: Minn. Stat. §§609.205 and 609.378. The Minnesota Court recognized that the essence of the due process infirmity was not that either statutes was vaguely worded, but that given the circumstances of this case where Respondent Kathleen McKown was aware of and specifically relied upon the statutory provision allowing spiritual treatment for children, that the child neglect statute misled Respondents by stating they could, in good faith, select and depend upon spiritual means or prayer without further advising that should their chosen treatment fail, they might face criminal charges beyond those provided in that statute. As the Minnesota Supreme Court recognized:

> "In short, Respondents argue that the child neglect statute does not go far enough to provide reasonable notice of the potentially serious consequences of actually relying on the alternative treatment methods the statute itself clearly permits." *State v. McKown*, 475 N.W.2d 63, 67 (Minn. 1991).

The interrelation of these two statutes as interpreted by the State Supreme Court does not present an important federal question. Supreme Court Rule 10(c). The Minnesota statute allows parents to "select and *depend*

upon "(emphasis added) spiritual means as health care without limitation to non-serious illness. No other case has interpreted such a broadly worded spiritual treatment accommodation.

Since Ian's death on May 9, 1989, one of the statutes in question has been rewritten and other statutes bearing upon child neglect have been amended and revised.

Minn. Stat. §609.378 was rewritten in 1989 to add a new offense of endangerment, Minn. Stat §609.378, Subd. 2.

As noted by the Minnesota Court of Appeals, the Minnesota Legislature in 1989 enacted reporting requirements designed to prevent future tragedies such as Ian's death. *State v. McKown,* 461 N.W.2d 720 at 722 (Minn. App. 1990). These changes in the child abuse reporting statutes became effective August 1, 1989. Previously, the statute defined "neglect" as a caretaker's failure to supply a child with necessary food, clothing, shelter or medical care. The statute stated, however, that a child would not be considered neglected solely because its caretaker in good faith selected and depended upon spiritual means of prayer for treatment or care of disease. Minn. Stat. §626.556, Subd. 2(c) (1982). The amendment extends a duty of reporting cases in which the child is being treated spiritually "if a lack of medical care may cause imminent and serious danger to the child's health." Minn. Stat. §626.556, Subd. 2(c) (1989).

This latter statutory change caused the Court of Appeals to conclude:

> "We note initially that the circumstances surrounding the tragic death of Ian Lundman are not likely to rise again. The Minnesota Legislature has acted to greatly reduce the likelihood that a case such as Ian's would remain undetected in the future" (*Id.,* at 722).

The misleading nature of Minn. Stat. §609.378 when viewed in the facts of this case is obvious given the specific reliance of Respondent Kathleen McKown as set forth in her Affidavit of December 21, 1989 (Ap. ___).

"I was well aware of the State of Minnesota's law recognizing the right to provide spiritual treatment for children prior to the death of my son Ian. The Church publishes a handbook in which the statute is reproduced and discussed."

Mrs. McKown also relates in the Affidavit her familiarity with the legislative process relating to this statute and knowledge that the accommodation for spiritual treatment was unlimited.

Therefore, the unique factual circumstances of Respondents' knowledge of the broad accommodations for spiritual treatment in the Minnesota statute renders minimal the precedential value of the decision on other persons situated in other states.

The Minnesota Supreme Court recognized the unique broad statutory language. It noted the notice infirmities of the statute's failure to indicate a point at which relying on spiritual treatment would expose a parent to criminal liability, and contrasted that failure to the narrowing and defining language adopted by the Oklahoma Legislature. *State v. McKown*, 475 N.W.2d 63, 68 (fn. 8). A Minnesota legislative commission in 1990 recommended a similar narrowing revision (Ap. 3) and pending legislative proposals would abolish any recognition of treatment by prayer (Ap. 4).

The due process infirmities, given Respondents' reliance on the legislative enactments, caused the Minnesota Supreme Court to alternatively conclude:

"Further, the indictments issued against respondents violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct. (Citations omitted) *Id.*, at 68.

This due process decision is not an important decision of federal law,[1] either legally or factually.

[1] *State v. McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990) expressly grounded its decision alternatively upon the due process clause of the Minnesota Constitution. *Id.*, at 721, 723 (n.2). The trial Court similarly found an alternate state constitutional basis. (A-40). Minnesota has been in the forefront in recognizing broader state constitutional protections; *Friedman v. Commissioner of Public Safety*, ___ N.W.2d ___ (Minn. June 7, 1991) (right to counsel). Additionally, the Minnesota Court upon remand in *State v. Herschberger*, 110 S.Ct. 1918 (1990) unequivocally relied upon independent state constitutional grounds in light of this Court's free exercise decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) noted the Minnesota Constitution alone provides an independent and adequate state constitutional basis upon which to decide. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1040 (1983); L. Tribe, *American Constitutional Law*, §3-24 at 165-166 (2d Ed. 1988); Fleming and Nordby, *Minnesota Bill of Rights: Wrapt In The Old Miasmal Mist*, 7 Hamline Law Review, 51 (1984). *Herschberger, supra*, itemized other individual liberties that have been recognized as deserving greater protection under the state constitution including due process. *State v. Oman*, 110 N.W.2d 514, 522-23 (Minn. 1961).

State v. Gumina, 395 N.W.2d 349 (Minn. 1986) implies that state due process affords extra protections, above and beyond minimum Fifth and Fourteenth Amendment United States constitutional guarantees. *See, also, Shreve v. Department of Economic Security*, 283 N.W.2d 506, 509 (Minn. 1979).

Unlike the federal due process provisions, the Minnesota Constitution requires "[n]o person shall be held to *answer for a criminal offense* without due process of law." Minn.Const. Art. I, §7. (Emphasis added). Unless this language is entirely superfluous, it provides greater pretrial protection than the federal due process clause. The threshold for dismissal of this prosecution, before trial, on due process grounds should, therefore, be correspondingly lower than the standard in federal courts.

Moreover, in this case, particular state interests demand heightened due process consideration. "Perhaps the most compelling basis for independently interpreting the Minnesota Bill of Rights concerns conditions unique to Minnesota." Fleming & Nordby, *The Minnesota Bill Of Rights: Wrapt In The Old Miasmal Mist*, 7 Hamline Law Review, 51 (1984). In this case, the notice, reliance, lenity, and arbitrary enforcement problems stem from the contradictory commands of a state law.

II. THE MINNESOTA SUPREME COURT DECISION DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT.

Petitioner claims that the due process decision by the Minnesota Supreme Court conflicts with three other decisions by a state court of last resort.

Hall v. State, 493 N.E.2d 433 (Ind. 1986) reversed a neglect conviction on double jeopardy grounds. It never addressed the due process implications of the interrelation of the Indiana statutes; accordingly, it is inapplicable.

Hermanson v. State, 570 S.2d 322 (Fla. App. 2 Dist. 1990) is not a decision of the state court of last resort; in fact, the Florida District Court of Appeals certified the question of their statutory spiritual treatment defense to the Florida Supreme Court. (Ap. 9). The matter only recently was heard at oral argument November 7, 1991.

Walker v. Superior Court, 253 Cal.Rptr. 1, 763 P.2d 852 (Cal. 1988), *reh'g denied* (Cal. 1989), *cert. denied*, 109 S.Ct. 3186 (1989) is a decision of the California court of last resort and, while not the primary thrust of the opinion, does address due process. However, the due process analysis there does not conflict with the Minnesota Supreme Court decision because of the differing state statutes, different facts and dissimilarity of analysis. *Walker* found that based on the wording of the state statues at issue and on the state legislative history, due process was not violated.

Petitioner argued *Walker, supra*, before the Minnesota Supreme Court which summarily rejected such reliance:

> "Appellant contends *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *Hermanson v. Florida*, 570 S.2d 322 (Fla. Dist. Ct. App. 1990), and *Hall v. State*, 493 N.E.2d 533 (Ind. 1986), support its position that the indictments do not violate due process. *None of these decisions, however, substantively address the issue of fair notice as raised by Respondents.*" (Emphasis added) (A 10, fn. 7).

There are several sound reasons why *Walker, supra*, 763 P.2d 852, does not control and, therefore, does not conflict.

First, the California prayer exemption statute is limited by its own language, "for that reason alone" *Id.*, 863-864; it is further limited to the section of law in which it appears. *Id.*, 858, 862. Minn. Stat. §609.378 has no limiting language and appears generally applicable to the criminal code.

Second, the California legislative history, *id.*, 861-862, and subsequent intervention statutes, *id.*, 865, support limiting the prayer exemption.

Minnesota legislative history and subsequent legislative action both evidence an intent not to limit Minn. Stat. §609.378 (A 37-39).

Third, the California statute has as its purpose "to secure support of the child and to protect the public from the burden of supporting a child who has a parent able to support him." *Id.*, 859. In Minnesota, the two statutes in question both appear in Chapter 609 the criminal code, both deal with the protection of persons from harm, and both set forth standards of care to be provided.

In addition to the legal differences noted above, there is a significant factual disparity between *Walker, supra* and *McKown, supra*. There is no indication in *Walker* defendant was specifically aware of an unlimited accommodation of prayer in lieu of medical treatment, nor reliance by defendant on such accommodation. The Minnesota Supreme Court's reasoning on the unique situation presented that, "a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct", *State v. McKown*, 475 N.W.2d 63, 68, would have no applicability to the California case. Therefore, the reliance and misleading components of the due process analysis apply only to *State v. McKown*, 475 N.W.2d 63 (Minn. 1991).

Petitioner has failed to demonstrate that the decision conflicts with any decision of another state court of last resort.

III. THE DECISION BELOW DOES NOT ALLOW THE PRACTICE OF RELIGION TO SUPERCEDE A CHILD'S RIGHT TO LIFE.

Petitioner argues that the Minnesota Supreme Court elevated the right to practice religion freely above a child's right to life. This a blatant misstatement of the Court's decision. The Minnesota Supreme Court decided the prosecution violated due process guarantees. It did not decide free exercise claims,

> "The Church of Christ, Scientist, as *amicus curiae,* argues that prosecuting Respondents for relying on Christian Science healing methods in the treatment of their son constitutes a violation of the right to freely exercise religious beliefs guaranteed by both the Federal and State Constitutions. Because of our disposition of this appeal, however, *we need not address this issue*" (emphasis added). *State v. McKown,* 475 N.W.2d 63, 69 (fn. 9) (Minn. 1991).

Further, the Minnesota Supreme Court explicitly rejected Petitioner's claim that children could not be protected as follows:

> "Further, we do not here conclude that the State could *never* prosecute an individual whose good faith reliance on spiritual methods of treatment results in the death of a child" (emphasis in original). *Id.,* at 68.

Respondents have never claimed, and do not now claim, that their right to practice their religion supercedes their child's right to life.

CONCLUSION

A case so heavily based on unique statutory wording and factual circumstances does not pose an important question of federal law, nor conflict with other decisions. Nor does it raise important reasons for review by this Court. Petitioner's efforts to expand the scope of this case beyond its due process underpinnings are unavailing, and the Writ must, accordingly, be denied.

Dated: December 16, 1991

Respectfully submitted,

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APPENDIX INDEX

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
v.
Kathleen Rita McKown,
William Lisle McKown,
Mario Victor Tosto,
Defendants.

AFFIDAVIT OF
KATHLEEN RITA McKOWN

D.C. File Nos. 89052952
89052954
89058941

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kathleen Rita McKown, being first duly sworn on oath, states and deposes as follows:

1. I am the defendant above named and make this Affidavit in support of my Motion to Dismiss the Indictment.

2. I was raised as a Christian Scientist. I have read a great deal of material concerning our faith including educational materials, articles and correspondence put out by the Church as well as literature, news stories and other materials from third parties.

3. I was well aware of the State of Minnesota's law recognizing the right to provide spiritual treatment for children prior to the death of my son, Ian. The Church publishes a handbook in which the statute is reproduced and discussed.

4. During the early part of 1989, as a result of my participation in a Church finance committee that dealt closely with James Van Horn, a representative for the State of Minnesota on the Committee on Publications, I was aware of Mr. Van Horn's involvement with the legislative process which resulted in additional legislative recognition being given to the practice of Christian Science.

5. In none of the statutes or materials which I have read was there ever any limit placed on a parent's ability to provide spiritual treatment for a child in lieu of medical care.

FURTHER AFFIANT SAYETH NOT.

Kathleen R. McKown

Subscribed and sworn to before me this 21st day of December, 1989.

Notary Public

Reporting and Childcare Providers

Childcare settings are especially vulnerable to false allegations, since the state's policy is to close childcare providers after receiving -- but before substantiating -- a report. One particular case came to the attention of the Commission, in which a recently fired employee made allegations of child-to-child abuse that eventually closed the childcare facility, although the allegations were later found to be unsubstantiated.

The Commission heard concerns about the county's response to the report. Investigators interviewed the director without an appoint during work hours, taking her attention from the children. Parents were told nothing by investigators for months, then were informed on a Friday that the center was to be closed the following Monday. The director eventually appealed and won the case in court, but her business had been destroyed. In light of the childcare shortage in the state, testifiers requested that the assumption of guilt upon receiving reports against childcare providers be reexamined.

Recommendations for Reporting

Funding Priority for 1990:

- Fund school social workers and guidance counselors in the school system for the purpose of early intervention in child-protection cases before court involvement. Require that such workers be in communication with the child-protection agency while maintaining confidentiality in the school system and community.
- Revise the "faith-healing" exceptions in the Child Abuse Reporting Act and criminal neglect statute to require parents who use prayer as a means of medical treatment to also seek traditional medical care.
- Require maltreatment recognition training as part of the state Board of Medical Examiners licensure renewal process for physicians who work with children.

Senators Ranum, McGowan, Reichgott, Kelly and Luther introduced -- S. F. No. 273 Referred to the Committee on Judiciary

A bill for an act

relating to children; expanding the crime of child neglect and the child abuse reporting act to include children who are neglected due to reliance by a parent, guardian, or other caretaker on spiritual health care; amending Minnesota Statutes 1990, sections 609.378, subdivision 1; and 626.556, subdivisions 2 and 10e.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 2. Minnesota Statutes 1990, section 609.378, subdivision 2, is amended to read:

Subdivision 1. [PERSONS GUILTY OF NEGLECT OR ENDANGERMENT.] The following people are guilty of neglect or endangerment of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

(a) [NEGLECT.] (1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation substantially harms the child's physical or emotional health is guilty of neglect of a child. ~~If a parent, guardian or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.~~

(2) A parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child.

(b) [ENDANGERMENT.] A parent, legal guardian, or caretaker who endangers the child's person or health by intentionally causing or permitting a child to be placed in a situation likely to substantially harm the child's physical or mental healthor cause the child's death is guilty of child endangerment. This paragraph does not prevent a parent, legal guardian, or caretaker from causing or permitting a child to engage in activities that are appropriate to the child's age, stage of development, and experience, or from selecting health care as defined in subdivision 1, paragraph (a).

Sec. 2. [DEFINITIONS.] As used in this section, the following terms has the meanings given them unless the specific content indicates otherwise:

(a) "Sexual abuse" means the subjection of a child by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344, or 609.345. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 or 617.246. Sexual abuse includes threatened sexual abuse.

(b) "Person responsible for the child's care" means (1) an individual functioning within the family unit and having responsibilities for the care of the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching.

(c) "Neglect" means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able

to do so. ~~Nothing in this section shall be construed to mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child in lieu of medical care, except that there is a duty to report if a lack of medical care may cause imminent and serious danger to the child's health.~~ This section does not impose upon persons, not otherwise legally responsible for providing a child with necessary food, clothing, shelter, or medical care, a duty to provide that care. Neglect includes prenatal exposure to a controlled substance, as defined in section 253B.02, subdivision 2, used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance. Neglect also means "medical neglect" as defined in section 260.015, subdivision 2a, clause (5).

(d) "Physical abuse" means any physical or mental injury, or threatened injury, inflicted by a person responsible for the child's care or a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive and deprivation procedures that have not been authorized under section 245.825.

(e) "Report" means any report received by the local welfare agency, police department, or county sheriff pursuant to this section.

(f) "Facility" means a day care facility, residential facility, agency, hospital, sanitarium, or other facility, or institution required to be licensed pursuant to sections 144.50 to 144.58, 241.021, or 245A.01 to 245.16.

(g) "Operator" means an operator or agency as defined in section 245A.02.

(h) "Commissioner" means the commissioner of human

services.

(i) "Assessment" includes authority to interview the child, the person or persons responsible for the child's care, the alleged perpetrator, and any other person with knowledge of the abuse or neglect for the purpose of gathering the facts, assessing the risk to the child, and forumulating a plan.

(j) "Practice of social services," for the purposes of subdivision 3, includes but is not limited to employee assistance counseling and the provision of guardian ad litem services.

(k) "Mental injury" means an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture.

(l) "Threatened injury" means a statement, overt act, condition, or status that represents a substantial risk of physical or sexual abuse or mental injury.

Sec. 3. Minnesota Statutes 1990, section 626.556, subdivision 10e, is amended to read:

Subd. 10e. [DETERMINATIONS.] Upon the conclusion of every assessment or investigation it conducts, the local welfare agency shall make two determinations: first, whether maltreatment has occurred; and second, whether child protective services are needed.

(a) For the purposes of this subdivision, "maltreatment" means any of the following acts or omissions committed by a person responsible for the child's care:

(1) physical abuse as defined in subdivision 2, paragraph (d);

(2) neglect as defined in subdivision 2, paragraph (c);

(3) sexual abuse as defined in subdivision 2, paragraph (a); or

(4) mental injury as defined in subdivision 2, paragraph (k).

(b) For the purposes of this subdivision, a determination that child protective services are needed means that the

local welfare agency has documented conditions during the assessment or investigation sufficient to cause a child protection worker, as defined in section 626.559, subdivision 1, to conclude that a child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment.

~~(c) This subdivision does not mean that maltreatment has occurred solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child in lieu of medical care. However, if lack of medical care may result in imminent and serious danger to the child's health, the local welfare agency may ensure that necessary medical services are provided to the child.~~

Sec. 4. [EFFECTIVE DATE.]

Section 1 is effective August 1, 1991, and applies to crimes committed on or after that date.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

WILLIAM HERMANSON and CHRISTINE HERMANSON,	)	
Appellants,	)	
v.	)	Case No. 89-02076
STATE OF FLORIDA,	)	
Appellee.	)	

Opinion filed November 21, 1990.

ON MOTION FOR REHEARING AND CLARIFICATION

PER CURIAM.

The motion of the appellants is denied, except for that portion requesting that we certify a question of great public importance to our supreme court, which we grant. Therefore, we certify the following question to the Supreme Court of Florida:

> IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

SCHOONOVER, C.J., and DANAHY and THREADGILL, JJ., Concur.